



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Case 50 of 2007

REPUBLIC PROSECUTOR

versus

JAMES WAWERU MUNYI ACCUSED

RULING

The accused is charged with *Murder contrary to section 203 as read with section 204 of the Penal Code*. Before the commencement of the accused trial the accused raised a preliminary objection that his constitutional rights had been violated. The accused submitted that he was arrested on 3rd October 2007 and was not brought before court until 26th October 2007. Relying on the provisions of *Section 72(3)(b)* of the constitution and relying on the decisions of the Court of Appeal on prolonged detention the accused sought that he be acquitted of the charge before him. The investigating officer was called with view to giving an explanation why the accused was detained for a period in excess of 14 days as provided by that section. He stated that the accused was arrested by members of the public. After he was brought to the police station it took time to record witness statements. That the last statement was recorded on 9th October 2007. There after the file was submitted to the DCIO on 11th October 2007. The file was taken to the police station on 31st October 2007 with a request for further investigation to be carried out. On being cross examined the officer accepted that by 9th October 2007 all the statements being used in this case had been recorded. He said that other than the delay caused by the police internal procedures there was no other explanation he could offer why the accused had not been taken to court in time. The constitution does not recognize internal procedures as being a reasonable explanation for delay in presenting the accused before court. That being so it is clear that the police violated the accused constitutional rights. Such violation would lead the court to find that the accused ought to be acquitted. The Court of Appeal has so held in many cases.

That was the only explanation offered by the prosecution on their failure to abide by the provisions of section 72(3)(b) of the constitution. The accused argued that the provisions of Section 72(3) of the Constitution were violated in regard to his detention. That section provides as follows:-

“A person who is arrested or detained –

(a) for the purpose of bringing him before

a court in the execution of the order of

the court; or

(b) upon reasonable suspicion of his having committed or being about to commit, a criminal offence, and who is not released, shall be brought before a court within twenty four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.”

The Court of Appeal has held that the violation of an accused’s rights under the constitution can lead to an acquittal. This was the finding in the case of *ALBANUS MWASIA MUTUA Vs. REPUBLIC CRIMINAL APPEAL NO. 120 of 2004*, the Court of Appeal had the following to say in respect of such violation:-

“At the end of the day it is the duty of the courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place. The Jurisprudence which emerges from the cases we have cited in the judgment appears to be that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced to support the charge. In this appeal, the police violated the constitutional right or the appellant by detaining him in their custody for a whole eight months and that, apart from violating his rights under section 72(3) (b) of the constitution also amounted to a violation of his rights under Section 77 (1) of the constitution which guarantees to him a fair hearing within a reasonable time. The deprivation by the police of his right to liberty for a whole eight months before bringing him to court so that his trial could begin obviously resulted in his trial not being held within a reasonable time. The appellant’s appeal must succeed on that ground alone”.

Similarly in the case of *GERALD MACHARIA GITHUKU vs. REPUBLIC CRIMINAL APPEAL NO. 119 OF 2004*, the Court of Appeal in deciding the appeal found that the appellant had been detained for a total of 17 days from the date of his arrest to the date of being taken before court. The court of appeal in upholding his appeal had the following to say:-

“..... although the delay of the days

in bring the appellant to court 17 days

after his arrest instead of within 14 days

in accordance with section 72 (3)(b)

of the Constitution did not give rise to any substantial prejudice to the appellant and although, on the evidence, we are satisfied that he was guilty as charged, we nevertheless do not consider that the failure by the prosecution to abide by the requirements of section 72(3) of the constitution should be disregarded. Although the offence for which he was to be charged was a capital offence, no attempt was made by the Republic, upon whom the burden rested to satisfy the court that the appellant had been brought before the court as soon as was reasonably practicable.”

Having found that the accused constitutional rights were violated I do hereby acquit the accused of the charge of murder. I order the accused to be released unless otherwise lawfully held.

DATED AND DELIVERED THIS 25TH DAY OF SEPTEMBER 2008

MARY KASANGO

JUDGE